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No. 84-592

In The

Supreme Court of the United States

October Term, 1984

NORMAN WILLIAMS and SUSAN LEVINE,

Appellants,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Appellees.

APPEAL FROM THE SUPREME COURT OF VERMONT

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 9, 1984
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RELEVANT DOCKET ENTRIES

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Washington County Superior Court
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11/24/82	Complaint dated November 23, 1982 filed;
12/23/82	Motion to Dismiss & Memorandum of Law in Support of Motion filed by Atty. Eschen;
01/21/83	Mo. to Intervene as a Plaintiff, Mo. to File Amended Complaint, Amended Complaint & Memorandum of Law in Opposition to Defts' Mo. to Dismiss filed by Atty. Williams;
01/26/83	Hearing on pending motions; Morse, Judge; Motion to Intervene-granted; Motion to Dismiss-under consideration; Atty. Eschen to have 10 days to respond; Plt. to have 3 days to file Supplemental response;
02/04/83	Reply Memorandum to Pltf's Memorandum of Law in Opposition to Deft's Mo. to Dismiss filed by Atty. Eschen;
02/18/83	Memorandum in Reply to Defts' Supplemental and Reply Memorandum filed by Atty. Williams;
02/24/83	Opinion and Order filed; Copies mailed to counsel 2/25/83; The Motion to Dismiss filed by the Defendants is GRANTED;
03/22/83	Notice of Appeal dated March 21, 1983 filed by Atty. Williams.

Vermont Supreme Court
Docket No. 83-139

05/27/83	Printed case and appellant's brief filed by Atty. Williams.
07/21/83	Appellee's brief filed by Atty. Eschen.
07/28/83	Appellant's reply brief filed by Atty. Williams.

02/28/84 HEARD WITH FULL COURT: Atty's. Norman Williams and Andrew Eschen argued.

06/15/84 *ENTRY ORDER:* This case being controlled by our decision in *Leverson v. Conway,* — Vt. —, — A.2d —, filed this same date, the judgment below is affirmed. Copy of EO [Entry Order] and OP [Opinion] (Leverson v. Conway) mailed to Norman Williams, Esq. & Susan Levine and Andrew M. Eschen, Esq.

06/28/84 Motion for extension of time and motion for reargument filed by Atty. Williams.

07/09/84 *ENTRY ORDER:* Plaintiffs' motion for reargument is denied. cc of EO mailed to Mr. Williams and Atty. Eschen and trial court.

07/26/84 Notice of appeal to U.S. Supreme Court filed by Atty. Williams. Forwarded to Washington Superior Court.

12/12/84 Notice from U.S. Supreme Court advising "The statement of jurisdiction in this case having been submitted and considered by the Court, in the case probable jurisdiction is noted." Order sent on to Washington Superior Court.

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

NORMAN WILLIAMS

v.

STATE OF VERMONT AND
WILLIAM H. CONWAY, JR., ET AL.

MOTION TO DISMISS

NOW COMES the State of Vermont and William H. Conway, Jr., et al., and by and through Assistant Attorney General Andrew M. Eschen hereby moves this Honorable Court pursuant to V.R.C.P. 12(b)(6) to dismiss the above-captioned matter for the following reasons:

(1) Plaintiff lacks standing.

(2) The Complaint fails to state a claim upon which relief can be granted.

In support hereof, Defendant respectfully submits his Memorandum of Law, attached hereto and incorporated herein by reference.

Dated at Montpelier, Vermont this 22 day of December, 1982.

JOHN J. EASTON, JR.
ATTORNEY GENERAL

By: /s/ Andrew M. Eschen
Andrew M. Eschen
Assistant Attorney
General

STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. S-436-82 Wnc

NORMAN WILLIAMS and SUSAN LEVINE,

Plaintiffs,

v.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR., VERMONT
COMMISSIONER OF MOTOR VEHICLES,

Defendants.

AMENDED COMPLAINT

Norman Williams, pro se, and Susan Levine, by her attorneys, Gravel, Shea & Wright, Ltd., complain of the Defendants and allege as follows:

PRELIMINARY STATEMENT

1. This action is brought by the Plaintiffs to prevent deprivation under the color of Vermont law of certain rights, privileges and immunities secured to the Plaintiffs by the Constitutions of the United States and the State of Vermont. The action seeks a judgment ordering that the "purchase and use tax" paid by Plaintiffs under Sections 8903 and 8911 of Title 32, Vermont Statutes Annotated, be refunded and declaring that such sections are unconstitutional, both in general and as applied to Plaintiffs on the particular facts of this case.

2. This action is brought pursuant to 42 U.S.C. §§1983 and 1988. The relief sought is mandated by *Austin v. New Hampshire,* 420 U.S. 656 (1975), and *Baldwin v. Fish & Game Commission,* 436 U.S. 371 (1978).

PARTIES

3. Plaintiff Norman Williams is a Vermont resident who moved to Vermont from Illinois on February 1, 1981. Plaintiff Williams has worked in Vermont since February 1, 1981, and thus qualifies as a resident for purposes of 32 V.S.A. §8902(2) and 23 V.S.A. §4(30).

4. Plaintiff Susan Levine is a Vermont resident who moved to Vermont from New York in November, 1979. Plaintiff has worked in Vermont since November, 1979, and thus qualifies as a resident for purposes of 32 V.S.A. §8902(2) and 23 V.S.A. §4(30).

5. Defendant William H. Conway, Jr., is Commissioner of the Department of Motor Vehicles for the State of Vermont. Defendant Conway is authorized under 32 V.S.A. §8901 to administer the Motor Vehicle Purchase and Use Tax imposed by 32 V.S.A. §8903 and under 32 V.S.A. §8909 to suspend the right to operate a motor vehicle in the event such tax is not paid.

FACTUAL ALLEGATIONS

Norman Williams

6. Plaintiff Williams purchased a 1980 Volkswagen Dasher Diesel on December 10, 1980, for Nine Thousand Three Hundred Dollars ($9,300.00) from Cole Volkswagen in Chicago Heights, Illinois. At the time of the purchase, Plaintiff Williams paid a five percent (5%) Illinois sales tax, or $465.00.

7. Plaintiff Williams' Illinois registration expired on September 30, 1981. As a resident of Vermont under the terms of 23 V.S.A. §4(30), Plaintiff Williams was then

immediately required to register his motor vehicle in Vermont by operation of 23 V.S.A. §301.

8. Plaintiff Williams presented his completed Registration Tax and Title Application to Thomas McCormick of the Vermont Department of Motor Vehicles on October 22, 1981, but declined to pay the registration tax on grounds that such tax was unconstitutional.

9. Without payment of the Motor Vehicle Registration and Use Tax, the Department of Motor Vehicles and the Defendant Conway refused vehicle registration.

10. On November 3, 1981, Plaintiff Williams instituted an action in Vermont Federal District Court for a declaratory judgment that 32 V.S.A. §§8903, 8909, and 8911 are unconstitutional and void.

11. On June 30, 1982, following the Supreme Court's decision in *California v. Grace Brethren Church,* 50 U.S. L.W. 4703 (June 18, 1982), the action referred to in paragraph 9 was dismissed on jurisdictional grounds under the Tax Injunction Act, 28 U.S.C. §1341.

12. On August 27, 1982, Plaintiff Williams again presented a completed Registration Tax and Title Application to the Vermont Department of Motor Vehicles.

13. Based on an estimated market value of $4,300, the Vermont Department of Motor Vehicles assessed a "purchase and use tax" of $172 on the Plaintiff Williams' automobile.

14. Plaintiff Williams paid the "purchase and use tax" assessed by check dated August 27, 1982.

15. On August 27, 1982, Plaintiff Williams also requested a hearing for refund on the grounds the "purchase

and use tax" is unconstitutional, which hearing was granted by the Department of Motor Vehicles on October 12, 1982.

16. By a memorandum dated October 26, 1982, the Department of Motor Vehicles refused to refund the "purchase and use" tax paid by Plaintiff Williams.

Susan Levine

17. Plaintiff Susan Levine purchased a 1979 Chrysler Horizon on September 29, 1978, for Four Thousand Nine Hundred Twenty-three Dollars and Forty Cents ($4,923.40) from Upstate Auto Service and Body Works, Inc. in Saranac Lake, New York. At the time of purchase, Plaintiff Levine paid a seven percent (7%) New York sales tax, or Three Hundred Forty-four Dollars and Sixty-four Cents ($344.64).

18. Plaintiff Levine's New York registration will expire on February 28, 1983. As a resident of Vermont under the terms of 23 V.S.A. §4(30), Plaintiff Levine will be required to register her motor vehicle in Vermont by operation of 23 V.S.A. §301.

19. On December 16, 1982, Plaintiff Levine presented a completed Registraton Tax and Title Application to the Vermont Department of Motor Vehicles.

20. Based on an estimated market value of Two Thousand Seven Hundred Fifty Dollars ($2,750), the Vermont Department of Motor Vehicles assessed a "purchase and use tax" of One Hundred Ten Dollars ($110) on Plaintiff Levine's automobile.

21. Plaintiff Levine paid the "purchase and use tax" assessed by check dated December 16, 1982.

LEGAL CLAIMS

22. Section 8903(b) of Title 32 imposes a tax of four percent of the taxable cost of a motor vehicle, or $600, whichever is smaller, at the time such motor vehicle is first registered in Vermont. "Taxable cost" is defined at 32 V.S.A. §8902(5) with respect to one-owner cars as the "purchase price of a motor vehicle," but the Vermont Motor Vehicle Department, as a matter of policy, imposes tax only on the market value of the car at registration.

23. Section 8911(9) of Title 32 exempts from the registration tax "pleasure cars acquired outside the state by a *resident of Vermont* on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances." (Emphasis added).

24. The states of Illinois and New York, in which Plaintiffs acquired their cars, do grant pro-rata credit for Vermont taxes so as to qualify under the §8911(9) exemption. Thirty-five of the fifty states grant such credit.

25. Plaintiffs and other persons moving into Vermont and acquiring resident status under 23 V.S.A. §4 are required to register their cars by 23 V.S.A. §301 and to pay registration tax by 32 V.S.A. §8903, even though a similar tax has already been paid in another state. Individuals not complying with 23 V.S.A. §301 or 32 V.S.A. §8903 face suspension of driving privileges under 32 V.S.A. §8909.

26. The imposition of the Motor Vehicle Purchase and Use Tax under 32 V.S.A. §§8903(b) and 8911(9) on non-residents but not residents purchasing pleasure cars outside the state violates privileges and immunities to which Plaintiffs are entitled under Article IV, Section 2 of the United States Constitution.

27. Imposition of the Motor Vehicle Purchase and Use Tax under 32 V.S.A. §§8903(b) and 8911(9) on non-residents but not residents purchasing pleasure cars outside the state violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under the Proportional Contribution Clause of the Vermont Constitution.

28. Imposition of the Motor Vehicle Purchase and Use Tax under 32 V.S.A. §§8903(b) and 8911(9) on non-residents but not residents purchasing pleasure cars outside the state violates Plaintiffs' right under the Commerce Clause of the United States Constitution, Art. I, §8, Cl.3, by unlawfully discriminating against purchases by non-residents.

RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered:

1. Declaring that 32 V.S.A. §§8903(b), 8909, and 8911 are unconstitutional and void insofar as they impose a registration fee and license suspension penalty on Plaintiffs by reason of their non-resident status which would not be imposed on Vermont residents in the same circumstances;

2. Ordering the Defendant Department of Motor Vehicles to refund the purchase and use tax of $172 paid by Plaintiff Williams and the $110 paid by Plaintiff Levine in this case; and

3. Granting Plaintiffs such other relief as the court may deem just, proper, and equitable, including costs and reasonable attorneys' fees as authorized by 42 U.S.C. §1988.

Dated: Burlington, Vermont
January 20, 1983

The Plaintiffs

/s/ Norman Williams
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Pro Se and Attorney for
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STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT
DOCKET NO. S436-82WnC

NORMAN WILLIAMS and SUSAN LEVINE

v.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.

OPINION AND ORDER

The above-entitled cause came before the Washington Superior Court on the Motion to Dismiss filed by Defendants. Plaintiffs seek a declaratory judgment that 32 V.S.A. §8903 and §8911 are unconstitutional and refund of the use tax they have paid.

Plaintiffs purchased their motor vehicles out-of-state prior to the time they became residents of Vermont and paid sales tax to the states where the purchases were made, Williams in Illinois and Levine in New York. Both Plaintiffs subsequently moved to Vermont and paid, under protest, a Vermont use tax on the present fair market value of their vehicles. In this action, they maintain that the imposition of a use tax without an offsetting credit for the sales tax they paid to another state violates the Privileges and Immunities, the Equal Protection and the Commerce Clauses of the United States Constitution, and the Proportional Contribution Clause of the Vermont Constitution.

32 V.S.A. §8903 imposes a sales tax of 4% of the taxable costs of the vehicle or $600, whichever is less, upon all motor vehicles purchased by residents of Vermont.

Subsection (b) of that provision imposes a corollary use tax of the same amount which is triggered by the registration or transfer of registration of a vehicle. A use tax need not be paid if a Vermont sales tax has been paid. In addition, 32 V.S.A. §8911 provides a further exception to the use tax for:

> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales tax or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

A similar provision which applied to pleasure cars acquired outside the state by nonresidents was repealed in 1979.

Under this statutory scheme, a Vermont resident who purchases a motor vehicle out-of-state is credited for sales tax paid in the state of purchase when the Vermont use tax is imposed. A nonresident who purchases a car out-of-state and subsequently registers his car in Vermont is not granted such a credit. This distinction, Plaintiffs maintain, violates their constitutional rights.

All states which impose a sales tax also impose a complementing use tax on tangible property acquired outside of the state. This measure is intended to protect sales tax revenues by placing in-state retailers on a competitive parity with out-of-state retailers exempt from the local sales tax. *National Geographic v. California Equalization Board,* 430 U.S. 551, 555 (1977). The power of the states to establish a nondiscriminatory tax on the use of goods brought from another state has been firmly established. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1938).

The Washington use tax statute construed by the Court in *Henneford* provided an offsetting credit available to residents and nonresidents alike if any tax had been paid to another state by reason of use or purchase there. *Id.* at 584. The Court cautioned, however, that

> [w]e have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination.

Id. at 587. And, in a later decision, the Supreme Court declined to rule on the constitutional necessity of an offset in the absence of evidence that the taxpayer had paid a sales tax in the state of origin. *Southern Pacific Co. v. Gallagher,* 305 U.S. 167 (1939).

The practice of granting a credit for sales tax has been adopted by a majority of the states which impose a use tax on out-of-state purchases. 68 Am.Jur.2d *Sales and Use Taxes* §220. Vermont, like most, provides for such a credit for purchases by residents. The sole issue before the Court, therefore, is whether the legislature's failure to provide a similar credit for nonresidents constitutes discrimination of constitutional dimensions.

The mandate of *Halliburton Oil Well Cementing Co. v. Reilly,* 373 U.S. 64, 70 (1963), is that "equal treatment for in-state and out-of-state taxpayers similarly situated is a condition precedent for a valid use tax on goods im-

ported from out-of-state." Equality of treatment refers to what happens within the taxing state, and not to the entire tax burden imposed on a particular taxpayer.

If a difference in treatment exists, the Court must impose "only the minimum scrutiny of the so-called 'rational basis test'." *Hadwen, Inc. v. Dept. of Taxes,* 139 Vt. 37, 42, 422 A.2d 255 (1980). Classification is unconstitutional only when similar people are treated differently for wholly arbitrary and capricious reasons. *Id.* Where the classification rests on "some reasonable consideration of legislative policy, it is not unconstitutional." *Andrews v. Lathrop,* 132 Vt. 256, 259, 315 A.2d 860 (1974).

> [The] equal protection [clause] does not require identity of treatment with respect to classification for tax purposes, but only that the classification or distinction rest on a real, unfeigned difference; have some relevance to the legislative purpose; and lead to a difference in treatment which is not so disparate as to be wholly arbitrary.

Vermont Motor Inns, Inc. v. Town of Hartford, 134 Vt. 52, 55, 350 A.2d 369 (1975).

We are persuaded that 32 V.S.A. §8911 does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state. We conclude, however, that this disparity is supported by a rational purpose and is reasonably structured to advance a legitimate legislative goal.

We take as a logical starting point the premise that Vermont has the right to impose a sales or use tax on all motor vehicles purchased or used within the state. In fact, however, neither Vermont, New York or Illinois imposes a sales tax on vehicles sold to nonresidents. To

that extent, the reciprocal credit provision of 32 V.S.A. §8911 is inapplicable, since a Vermont resident buying a car in New York or Illinois would not have paid a sales tax, and would thus be liable for the entire amount of use tax in Vermont.

Vermont taxes only sales made to Vermont residents, whether in the guise of a sales tax (if purchased in-state) or a use tax (if purchased out-of-state). Whatever the tax is called, it is imposed only once—by the state of consumption. When a motor vehicle is used in more than one state, however, it is reasonable to subject it to a use tax in each state. Were it otherwise, a Vermont use tax might be avoided altogether "by the simple expedient of buying and using the property outside the [state] for a period sufficiently long to avoid the imposition of such a tax." *Atlantic Gulf & Pac. Co. v. Gerosa,* 16 N.Y.2d 1, 209 N.E.2d 86, 89 (1965). It is important to note, moreover, that the use tax imposed upon Plaintiffs is not upon the original price of the motor vehicles, but only on their value at the time they were brought into the state.

While the overall tax burden on the Plaintiffs may be greater than on a state resident who does not move, we are persuaded that this difference is supported by their use of the highways of more than one state. In any event, the test for an equal protection claim is whether discrimination occurs within the state, and we find that it does not. The state exacts a use tax upon the value of all cars used *within* the state, regardless of whether they were purchased by residents or nonresidents, and Plaintiffs have failed to demonstrate that they would have been treated any differently had they been Vermont residents when they purchased their cars.

Plaintiffs have also failed to show any infringement of their right to travel freely between states. They, like Vermont residents, have merely been compelled to pay for the privilege of using Vermont highways.

The test of whether a statute infringes on the right of free interstate travel is whether it "has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them." *Place v. Place,* 129 Vt. 326, 328, 278 A.2d 710 (1971), citing *Shapiro v. Thompson,* 394 U.S. 618 (1969). Clearly, not every differential between states can be said to violate the fundamental right to travel.

Unlike *Shapiro,* the regulation in question does not inflict a severe penalty or have "dire effects". See *Starns v. Malkerson,* 401 U.S. 985 (1971), aff'g without opinion 326 F.Supp. 234 (D. Minn. 1970). As one commentator has stated, "[right to travel] cases may . . . be understood more readily as revolving about the issues of welfare and poverty and not truly about the fundamental right to travel." L.Tribe, *American Constitutional Law* 1005. We are persuaded that the denial of welfare benefits or emergency medical relief for a year, or an extended residency requirement in order to vote, offer a very different kind of impediment to travel between states than does the very minimal monetary outlay compelled by 32 V.S.A. §8903. The imposition of a use tax on vehicles purchased out-of-state does not impede the right to travel, even in the absence of a credit for previously paid sales tax.

Nor is the Court persuaded that Vermont's use tax violates the Privileges and Immunities Clause of the United

States Constitution. 68 Am.Jur. 2d *Sales and Use Taxes* §197; *State v. Fields,* 27 Ohio L.Abs, 662, 35 N.E.2d (1938). To support a claim that a taxing statute abridges constitutional privileges and immunities, Plaintiffs must demonstrate that they are treated differently from state citizens without a reasonable basis. *Wheeler v. State,* 127 Vt. 361, 366, 249 A.2d 887 (1969), citing *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 79. Since we have concluded that the difference in treatment afforded residents and nonresidents, if any, has a reasonable basis, we conclude that Plaintiffs have failed to demonstrate that the statutes in question violate the Privileges and Immunities Clause of the constitution.

With respect to Plaintiffs' claim regarding a violation of the Commerce Clause, we conclude that no discrimination against interstate commerce has been demonstrated. The Vermont use tax statutes do not discourage purchases from out-of-state retailers, or benefit in-state retailers at another state's expense. At most, assuming that the nonresident knew at the time of purchase that he intended to establish residency in Vermont, the statutes would furnish an incentive to move prior to the acquisition of an out-of-state motor vehicle.

The Proportional Contribution Clause of the Vermont Constitution has been construed by the Court as the practical equivalent of the Equal Protection Clause of the federal constitution. *Pabst v. Commissioner of Taxes,* 136 Vt. 126, 388 A.2d 1181 (1978). For the same reasons the Court found no infringement of the Fourteenth Amendment, therefore, we conclude that Plaintiffs have failed

to demonstrate that the Proportional Contribution Clause has been violated.

In view of the foregoing, it is hereby ORDERED AND ADJUDGED:

The Motion to Dismiss filed by the defendants is GRANTED.

Dated at Montpelier, Vermont this 24th day of February, 1983.

/s/ James L. Morse
James L. Morse
Superior Judge

/s/ Willis C. Bragg
Willis C. Bragg

/s/ Patricia B. Jensen
Patricia B. Jensen

STATE OF VERMONT
WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82Wnc

NORMAN WILLIAMS and SUSAN LEVINE,

Plaintiffs,

v.

STATE OF VERMONT AND
WILLIAM H. CONWAY, JR., Vermont Commissioner
Of Motor Vehicles,

Defendants.

NOTICE OF APPEAL
(Filed March 22, 1983)

Notice is given that Norman Williams and Susan Levine, Plaintiffs in the above case, hereby appeal to the Supreme Court from the Opinion and Ordered entered in this action on February 24, 1983.

Dated: Burlington, Vermont
March 21, 1983

THE APPELLANTS

By: /s/ Norman Williams
Norman Williams, Esq.
Pro Se and Attorney
for Susan Levine
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VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June Term, 1984

NORMAN WILLIAMS, Esq. and SUSAN LEVINE

v.

STATE OF VERMONT;
WILLIAM H. CONWAY, JR.,
COMMISSIONER OF MOTOR VEHICLES

APPEALED FROM: Washington Superior Court

Docket No. S-436-82Wnc
(Filed June 15, 1984)

In the above entitled cause
the Clerk will enter:

Ths case being controlled by our decision in *Leverson v. Conway*, — Vt. —, — A.2d —, filed this same date, the judgment below is affirmed

BY THE COURT:

/s/ Franklin S. Billings, Jr.
Chief Justice

/s/ William C. Hll

/s/ Wynn Underwood

/s/ Louis P. Peck

/s/ Ernest W. Gibson III
Associate Justices

No. 83-157

SUPREME COURT

ON APPEAL FROM DISTRICT COURT OF VERMONT,
UNIT NO. 1, RUTLAND CIRCUIT

LEONARD G. LEVERSON

v.

WILLIAM H. CONWAY,
VERMONT DEPARTMENT OF MOTOR VEHICLES

November Term, 1983

Francis B. McCaffrey, J.
Leonard G. Leverson, pro se, Pittsford, plaintiff-appellant
John J. Easton, Jr., Attorney-General, and Andrew M. Eschen, Assistant Attorney General, Montpelier, for defendant-appellee

PRESENT: Billings, C.J., Hill, Underwood, Peck and Gibson, JJ.

GIBSON, J. On May 29, 1982, while residing in Wisconsin, plaintiff purchased a 1979 Subaru station wagon for the sum of $4325. He paid a five percent sales tax of $216.25 to the state of Wisconsin. In July 1982 plaintiff moved to Vermont. Upon registering his vehicle in Vermont in August 1982, plaintiff was required to pay a use tax of $112 as a condition of registration. The use tax, computed at the rate of four percent on a low book value of $2800 as of the date of registration was paid by plaintiff under protest. Subsequently, plaintiff brought suit to recover the $112. The matter was submitted to the small claims court on an agreed statement of facts. Upon the entry of judgment for defendant, plaintiff appealed, presenting the following issues for our consideration.

(1) Whether the Vermont motor vehicle purchase and use tax (32 V.S.A. § 8901 et seq.) violates the Equal Protection Clause of the Fourteenth Amend-

ment to the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;

(2) Whether the Vermont motor vehicle purchase and use tax violates the Proportional Contribution Clause (Ch. I, Art. 9) of the Vermont Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence;

(3) Whether the Vermont motor vehicle purchase and use tax violates the Privileges and Immunities Clause of Article IV, § 2, cl. 1 of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence; and

(4) Whether the Vermont motor vehicle purchase and use tax violates the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution by its failure to afford to a new resident credit for the sales tax paid on an automobile purchased, used, and registered in a former state of residence.

32 V.S.A. § 8903 imposes a tax of four percent, or $600, whichever is smaller, upon the purchase and use of motor vehicles within the State of Vermont. The tax is payable by residents of the state at the time of purchase, *id.* § 8903(a), or, if the vehicle is purchased out-of-state, at the time the vehicle is first registered for use within the state. *Id.* § 8903(b).

Residents who purchase pleasure cars outside the state and pay a sales or use tax to another state are exempt from paying a use tax to the State of Vermont, at least to the extent of the tax paid the other state, providing the state of purchase has a reciprocal agreement with Ver-

mont that grants a similar credit for Vermont tax paid under similar circumstances. *Id.* § 8911(9).

Until recently, a nonresident who purchased, registered and used his pleasure car in another state for at least thirty days was also granted an exemption; however, that exemption was repealed effective September 1, 1980. 1979 No. 202 (Adj. Sess.), § 3, Pt. VI, eff. Sept. 1, 1980 (repealing 32 V.S.A. § 8911(6)). As a result of the repeal, a nonresident who moves to Vermont and desires to register his motor vehicle here must pay the State of Vermont a use tax of four percent of the fair market value of his vehicle as of the time of registration. Although Wisconsin is a state that has a reciprocal agreement with the State of Vermont, the plaintiff, as a person who purchased his vehicle while a resident of Wisconsin and registered and used it in that state for more than thirty days, is not entitled to an exemption in light of the 1980 repeal.

The purpose of the motor vehicle purchase and use tax is to pay for improvement and maintenance of the state and interstate highway systems. 32 V.S.A. § 8901. The use tax, an important complement to the sale [sic] tax, is designed "to protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices." *Rowe-Genereux, Inc. v. Department of Taxes,* 138 Vt. 130, 133-34, 411 A.2d 1345, 1347 (1980). The power of a state to establish a nondiscriminatory tax on the user of goods brought from another state has long been firmly established. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937).

Sales and use taxes are different in concept, and they are assessed upon different transactions.

> A sales tax is a tax upon the freedom to purchase .... A use tax is on the enjoyment of that which was purchased .... Though sales and use taxes may secure the same revenues and serve the same complementary purposes, they are .... taxes on different transactions and for different opportunities afforded by a State.

McLeod v. Dilworth, 322 U.S. 327, 330-31 (1944). Because the taxes are intended to complement one another, a person who has paid a tax upon the purchase of a motor vehicle in Vermont is not subject to the payment of a use tax to the state. 32 V.S.A. § 8903(b).

We first consider whether Vermont's motor vehicle purchase and use tax violates the Equal Protection Clause. Plaintiff claims that the use tax adversely affects his right to travel and that any infringement of this fundamental right must be viewed with "strict scrutiny" by the courts. The right to travel has been recognized by the United States Supreme Court as a right that "protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982) (citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)). See also *Memorial Hospital v. Maricopa County, supra,* (one-year county residency requirement for nonemergency medical benefits struck down as penalizing exercise of right to travel without the showing of a sufficient state interest in justification); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement to vote in state election rejected on ground that no compelling state interest was shown to justify the penalty imposed as a result of the exercise of

the right to travel); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement to qualify for welfare benefits struck down on ground that no compelling governmental interest had been shown in justification of the state action penalizing the exercise of the right to travel).

The "strict scrutiny" test is invoked upon a showing of some penalty resulting from the exercise of a faundamental right, such as the right to travel; there is no requirement of a showing that a person was deterred from traveling, only that there was a penalty for doing so. *Dunn v. Blumstein, supra,* 405 U.S. at 340. Under the strict scrutiny test, "any classification which serves to penalize the exercise of .... [a fundamental] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson, supra,* 394 U.S. at 634 (emphasis in original).

Ordinarily, when this Court is called upon to determine whether a tax law violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Court is required to impose "only the minimum scrutiny of the so-called 'rational basis test'." *Hadwen, Inc. v. Department of Taxes,* 139 Vt. 37, 42, 422 A.2d 255, 258 (1980). See *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1959). "This test ... permits a determination of unconstitutionality only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds .... Where the classification rests upon 'some reasonable consideration of legislative policy,' it will not be found unconstitutional." *Hadwen, Inc. v. Department of Taxes, supra,* 139 Vt. at 42, 422 A.2d at 258-59 (citing *Andrews v. Lathrop,*

132 Vt. 256, 259, 315 A.2d 860, 862 (1974)); *Allied Stores of Ohio, Inc. v. Bowers, supra,* 358 U.S. at 527.

Plaintiff complains that the court below erroneously used the "rational basis" test, applying an insufficient standard to his complaint, and that had the "strict scrutiny" test been applied, the use tax, which plaintiff paid under protest, would have been declared an unconstitutional infringement of plaintiff's right to travel under the Equal Protection Clause, entitling plaintiff to recover the $112 he paid to the state.

Plaintiff misconceives the nature of the right he seeks to invoke. His right to travel has not been infringed. He suffered no restrictions on his right to travel to Vermont and incurred no penalty as a result of the exercise of this right. He was free to bring his property, including his station wagon, to Vermont without incurring any penalty as a result. He was free to move about the state in public or private conveyance (other than the station wagon) without restriction or penalty, and he was free to obtain a Vermont driver's license without having to pay any use tax on his vehicle. Only when plaintiff sought the privilege of operating that vehicle on Vermont's highways was he required to register it; registration, not the move to Vermont, triggered the use tax obligation. Had plaintiff not sought to register the vehicle, he would have been under no obligation to pay a use tax on it.

In *Wells v. Malloy,* 402 F. Supp. 856 (D. Vt. 1975), affirmed without opinion 538 F.2d 317 (2d Cir. 1976), the plaintiffs challenged the constitutionality of the statute providing for suspension of their right to drive following nonpayment of the automobile purchase and use tax. Rejecting plaintiffs' claim, the court held, "[a]lthough a driver's license is an important property right in this age of the automobile, it does not follow that the right to drive is fundamental in the constitutional sense." *Id.* at 858. Accord *Montgomery v. North Carolina Dept. of Motor Vehicles,* 455 F. Supp. 338, 342 (W.D.N.C. 1978) (revocation of driver's license for refusal to submit to chemical tests does not deprive licensee of any fundamental constitutional right).

As was stated in *Wells v. Malloy, supra,* 402 F. Supp. at 859,

> 'Vermont may no longer be thought of as having only dirt roads and an inadequate transportation and highway system.' (quoting *Miller v. Malloy,* 343 F. Supp. 46, 50 (D. Vt. 1972)). It is certainly possible to get from place to place using public transportation or by taking advantage of friends or family members.

In analyzing the argument that suspension of the right to drive is "beyond the pale of fair and just collection techniques" and that the State should be limited to refusing to register a motor vehicle when the purchase and use tax is not paid, the court stated,

> The issue is really whether it is easier to find someone to drive one's own car if one cannot drive, or to obtain a registered automobile for one's own use if one can drive but has no other car. Seen in this light, we cannot conclude that suspension of driving privileges is any more harsh or coercive than refusal to register a motor vehicle . . . .

Id. at 862. We agree and conclude that the plaintiff's right to register his motor vehicle does not rise to the level of a fundamental constitutional right, nor does it implicate the fundamental right to travel. Since no fundamental right is involved, the applicable standard for mea-

suring the constitutionality of Vermont's statute is the "rational basis" test.

As stated earlier, under the "rational basis" test we may find a statute unconstitutional "only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds." ***Hadwen, Inc. v. Department of Taxes, supra,*** 139 Vt. at 42, 422 A. 2d at 258. Any classification of taxation is permissible which "rationally furthers a legitimate state purpose." *Zobel v. Williams, supra,* 457 U.S. at 60; see ***Hadwen v. Department of Taxes, supra,*** 139 Vt. at 42, 422 A.2d at 259. Since the purpose of the purchase and use tax is to pay for the maintenance and improvement of the state and interstate highway systems, 32 V.S.A. § 8901, the tax bears an obviously reasonable relationship to the services provided, namely, the privilege of using those highways.

The Legislature has chosen to grant certain exemptions from the purchase and use tax, see 32 V.S.A. § 8911 (1)-(13); all non-exempt persons must pay the four percent tax. Among the legislative exemptions—and the only one pertinent hereto—is one for residents who pay a sales or use tax elsewhere on pleasure cars acquired outside Vermont, providing the state or province collecting the tax "would grant the same pro-rata credit for Vermont tax paid under similar circumstances." *Id.* § 8911(9).

We note that the Vermont motor vehicle purchase and use tax does not apply to most nonresidents. Those nonresidents who come into the state to purchase a vehicle and then leave immediately to return to their home states do not have to pay a purchase or use tax to Vermont. See *id.* § 8903(a) (purchase tax is payable "by a resident"). Those who must pay either a purchase tax or the compensating use tax include residents who purchase in Vermont, *id.* § 8903(a); residents who register cars purchased outside Vermont in a state or province that would grant no pro-rata credit for any Vermont purchase or use tax paid by one of its residents, *id.* § 8903(b); persons such as plaintiff who move into Vermont and then register cars acquired before they became residents of the state, see *id.* § 8903(a), (b); persons who accept employment or engage in a trade, profession or occupation in Vermont for a period of at least six months and purchase a car here or operate one for more than 30 days, *id.* §§ 8902(2), 8903(a), (b), 23 V.S.A. §§ 4(30), 301; and any foreign partnership, firm, association or corporation doing business in the state and using vehicles in the state in connection with its business, 32 V.S.A. §§8902(2), 8903(a), (b), 23 V.S.A. §§ 4(30), 301.

Thus, Vermont's basic policy is clear: those who use the state's highways must contribute toward their maintenance and improvement. It is also the state's policy to encourage residents to support the local economy by refusing to grant credit for taxes paid to any non-reciprocating state or province. The only exemption under the state's policies is for residents who buy in reciprocal states and cannot avoid paying a sales or use tax to such states. The exemption appears to be based upon a policy of encouraging out-of-staters from reciprocal states to purchase their vehicles in Vermont and pay a sales tax to Vermont, secure in the knowledge that they will not be subject to a duplicate tax in their home states, and upon a legislative assumption that few, if any, tax dollars will be lost through this exercise in comity. Whether the amount of highway tax raised in Vermont in this manner exceeds or falls below the amount lost to other states

through the reciprocal arrangement does not appear of record; nevertheless, the exempt classification is based on a reasonable legislative policy or purpose, and, unless wholly arbitrary, must be upheld. *Allied Stores of Ohio, Inc. v. Bowers, supra,* 358 U.S. at 527; *Hadwen, Inc. v. Department of Taxes, supra,* 139 Vt. at 42, 422 A.2d at 259.

As mentioned, the exemption is not available to residents who acquire cars in states having no reciprocal agreement with Vermont; nor is the exemption available to new residents, such as plaintiff, who, subsequent to acquiring their vehicles, move to Vermont and seek to register them here. A change in the law so as to provide an exemption to either group would run counter to the state's present policies of requiring user contributions and encouraging purchases within the state, and would result in the loss of tax revenues to the state. With respect to new residents, such as plaintiff, who bring their cars with them, they are beyond the reach of any policy of encouragement to purchase in this state, and there is no reason to exempt them from making a fair contribution to the maintenance and improvement of Vermont's highways. Under the present statutory scheme, plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state.

It is also necessary to keep in mind that § 8911(9) is an exemption from the payment of taxes, and exemptions are construed strictly, with no claim of exemption to be allowed unless shown to be within the necessary scope of the statute. *Rock of Ages Corp. v. Commissioner of Taxes,* 134 Vt. 356, 359, 360 A.2d 63, 65 (1975). "A state, for

many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford v. Silas Mason Co., supra,* 300 U.S. at 587. The fact that plaintiff does not qualify as a member of the exempt class does not deprive him of the equal protection of the law. *Storaasli v. Minnesota,* 283 U.S. 57, 62 (1931). "[T]he exemption is a proper and lawful one, and [plaintiff] cannot make out a discrimination against him from the mere fact that he is not in a position to claim it." *Id.*

We conclude that the exempt classification established by the Legislature is rationally related to a legitimate purpose of state government, namely, the promotion of commerce within the state and the raising of taxes to help maintain and improve the state and interstate highway system, and that the classification is not an arbitrary one. Accordingly, we find no violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

The Proportional Contribution Clause of the Vermont Constitution has been construed to be the practical equivalent of the Equal Protection Clause. *Pabst v. Commissioner of Taxes,* 136 Vt. 126, 131 n.2, 132-33, 388 A.2d 1181, 1184 (1978); *In re Estate of Eddy,* 135 Vt. 468, 472, 380 A.2d 530, 533-34 (1977). For the same reasons stated in Part I above, we conclude that there has been no violation of the Proportional Contribution Clause.

III.

Plaintiff also contends that 32 V.S.A. § 8909 violates the Privileges and Immunities Clause of Article IV of the

United States Constitution by failing to extend to new residents a credit for sales tax previously paid other States. Before this Court may apply the Clause to § 8909, however, we must first decide "whether the [statute] burdens one of those privileges and immunities protected by the Clause." *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden,* 52 U.S. L. W. 4187, 4190 (U.S. February 21, 1984) (No. 81-2110) (citing *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371, 383 (1978)). "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, alike." *Baldwin v. Montana Fish and Game Commission, supra,* 436 U.S. at 383. Thus the Privileges and Immunities Clause will not come into play unless a basic or fundamental right is involved.

Plaintiff argues that his right to travel is infringed by the requirement that he pay a use tax to register his vehicle, without being granted the same exemption or credit afforded to state residents. As we have previously noted, the right to travel, although a fundamental right, *Shapiro v. Thompson, supra,* 394 U.S. at 630, is not involved herein. Accordingly, the Privileges and Immunities Clause of the United States Constitution does not come into play and there has been no violation of that constitutional clause.

IV.

Finally, plaintiff invokes the Commerce Clause in support of his cause, contending that Vermont's purchase and use tax discriminates against interstate commerce by

failing to provide equal treatment for out-of-state purchases.

In order for the Commerce Clause to apply, the transaction at issue must be one that comes within the scope of interstate commerce. Because "interstate commerce" is a term of such wide implications and ramifications the courts have carefully avoided any attempt to give it a comprehensive definition. *Gross Income Tax Div. v. J. L. Cox & Son,* 227 Ind. 468, 475, 86 N.E.2d 693, 696 (1949).

Generally speaking, the indispensable element in interstate commerce is the importation of people or goods, even one's own goods, into one state from another. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 255-56 (1964); *United States v. Hill,* 248 U.S. 420, 423-24 (1919). Whether the movement is commercial in nature is immaterial. *Heart of Atlanta Motel, Inc. v. United States, supra,* 379 U.S. at 256. It has long been settled that when personal property has been brought into a state and come to a permanent rest, or merely halted for a moment before resuming its interstate journey, taxes upon the privilege of use, storage or consumption within the state do not impose an unconstitutional burden on interstate commerce. *General Trading Co. v. State Tax Commission,* 322 U.S. 335, 338 (1944); *Henneford v. Silas Mason Co., supra,* 300 U.S. at 582-83; *Brown v. Houston,* 114 U.S. 622, 633 (1885). In the words of Justice Cardozo, "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate." *Henneford v. Silas Mason Co., supra,* 300 U.S. at 583.

There can be no doubt that at all relevant times herein plaintiff and his vehicle had ceased to be in transit. His

intention was to move to Vermont, and at the time he sought to register the vehicle both he and the vehicle had come to rest in Vermont. Plaintiff's station wagon had become "part of the common mass of property within the state of destination," *id.* at 582, and was thus clearly an appropriate subject for the imposition of a non-discriminatory use tax in Vermont. There has been no violation of the Commerce Clause.

Affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson III
Associate Justice

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

Docket No. 83-139

NORMAN WILLIAMS and SUSAN LEVINE

v.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.
VERMONT COMMISSIONER OF MOTOR VEHICLES

MOTION FOR REARGUMENT

Appellants move under Rule 40, V.R.A.P., to reargue the decision filed in this case on June 15, 1984. This motion is based on the following grounds:

1. This Court erred as a matter of law in holding that the Vermont Motor Vehicle Purchase and Use Tax does not unconstitutionally discriminate against interstate commerce. The Court should reconsider its decision with respect to the Commerce Clause issue in light of *Armco, Inc. v. Hardesty,* 52 U.S.L.W. 4787 (June 12, 1984). *Armco* sets out the proper analysis in determining whether a state tax discriminates against non-residents in violation of the Commerce Clause. This Court's holding that the Commerce Clause does not apply because Appellants' automobiles "had come to rest in Vermont" has been explicitly rejected by the U.S. Supreme Court in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 332, fn. 12 (Commodity is protected " '*even after it has entered the State,* from any burdens imposed by reason of its foreign origin' " (emphasis added)).

2. This Court erred as a matter of law in holding that their "right to travel" was not violated nor even im-

plicated by the Vermont Motor Vehicle Purchase and Use Tax. The right to travel is implicated by *any* legislative scheme which classifies individuals on the basis of state residency or length of residency. *See,* e.g., *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (statute providing for free medical care for indigent Arizona residents struck down because non-residents not afforded same treatment). The right to travel is not concerned solely, or even primarily, with "the right to bring property into a state" or "the right to move about freely," as this Court suggests. Rather, it is concerned with resident —non-resident discrimination which effectively penalizes a non-resident for choosing to reside in Vermont.

3. This Court erred as a matter of law in holding that the Vermont Motor Vehicle Purchase and Use Tax does not violate the Privileges and Immunities Clause of the United States Constitution. First, the Privileges and Immunities Clause does not forbid only violations of "fundamental rights" under the Equal Protection Clause, such as the right to travel, as this Court states. *See,* e.g., *Austin v. New Hampshire,* 420 U.S. 656, 660 (differing treatment of residents and non-residents with respect to state income tax struck down as violating "norm of comity"). Second, as stated in paragraph 2 of this motion, the Appellants' rights to travel is in fact implicated and infringed by the Vermont Motor Vehicle Purchase and Use Tax statute.

Dated: Burlington, Vermont
June 27, 1984

THE APPELLANTS

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VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June Term, 1984

NORMAN WILLIAMS, Esq., and SUSAN LEVINE

v.

STATE OF VERMONT;
WILLIAM H. CONWAY, JR.,
COMMISSIONER OF MOTOR VEHICLES

APPEALED FROM: Washington Superior Court

Docket No. S-436-82Wnc

(Filed July 9, 1984)

In the above entitled cause
the Clerk will enter:

Plaintiffs' motion for reargument is denied.

BY THE COURT:
/s/ Franklin S. Billings, Jr.
Chief Juistice

/s/ William C. Hill

/s/ Wynn Underwood

/s/ Louis P. Peck

/s/ Ernest W. Gibson III
Associate Justices

[PA 249]